

STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE R. BUTTON, f/k/a MICHELLE R.
BROWN,

UNPUBLISHED
April 22, 2014

Plaintiff-Appellee,

v

TIM BILLS TRUCKING, INC., and MICHAEL
DWAYNE TYLER,

No. 306724
Osceola Circuit Court
LC No. 10-012170-NI

Defendants-Appellants.

Before: WHITBECK, P.J., and FITZGERALD and O'CONNELL, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*).

I agree with the majority's determination that the selective introduction of deposition testimony in this case was anomalous. I also concur with the majority that the trial court erred when it determined that evidence of equipment violations was admissible. I respectfully disagree with the remainder of the majority opinion. In my view, the trial court erred when it denied defendants' request to introduce the contextual deposition testimony of defendants' key witness, Michael Tyler. The court compounded this error when it allowed plaintiff, but not defendants, to read select excerpts of Mr. Tyler's deposition to the jury. The trial court further erred when it allowed plaintiff to present irrelevant evidence of equipment violations and when it implied that certain testimony was untruthful.

I would reverse and remand for a new trial.

I. EXCLUSION OF DEPOSITION TESTIMONY

The critical evidentiary issue in this case requires the application of three court rules: MCR 2.308(A), MRE 106, and MRE 804. In my opinion, the majority misapplies these rules. Even assuming *arguendo* that the majority, in isolation, is correct in its application of MCR 2.308(A) and MRE 804(b)(5), the majority's failure to apply MRE 106 denies defendants a substantial defense in this case.

MCR 2.308(A) provides that "[d]epositions or parts thereof shall be admissible at trial or on the hearing of a motion or in an interlocutory proceeding only as provided in the Michigan Rules of Evidence." In turn, MRE 106 states, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any

other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” And, MRE 804(b)(5) specifically provides that a party may introduce a witness’s deposition testimony if the witness is unavailable for trial.

The application of these rules indicates that Mr. Tyler’s deposition testimony was admissible. Mr. Tyler was unavailable for trial under MRE 804(a)(5) (declarant “is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance . . . by process or other reasonable means . . .”). Defense counsel stated to the court, “I did everything in my power to get [Mr. Tyler] to come to this trial.” Specifically, counsel confirmed that he mailed plaintiff’s trial subpoena to Mr. Tyler. In addition, defense counsel telephoned Mr. Tyler multiple times to attempt to persuade him to attend the trial. Nonetheless, Mr. Tyler refused to appear for trial; he informed defense counsel that on the trial date he would be out of Michigan. Under these circumstances, the entirety of Mr. Tyler’s deposition testimony was admissible at trial under MRE 804(a)(5).¹

A trial court abuses its discretion when its decision is outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Mr. Tyler was a key witness for defendant Tim Bills; no principled reason existed to exclude Mr. Tyler’s deposition testimony. Defense counsel informed the trial court:

[Plaintiff] took the deposition of Mr. Tyler, and I did not limit them in their questioning. They had a full and complete chance to go over anything that they had to ask him. And so it is based upon that, that the deposition is presently available if the Court will allow it to be used.

I conclude the trial court abused its discretion when it refused to allow Mr. Tyler’s deposition testimony to be read to the jury. See, e.g. *May v William Beaumont Hosp*, 180 Mich App 728, 764; 448 NW2d 497 (1989) (Michigan law allows a party to seek introduction of other parts of writings or recorded statements, citing MRE 106). The exclusion of the deposition testimony deprived defendants of a substantial defense in this case. For this reason alone, I would reverse the decision of the trial court and remand for a new trial.

III. ADDITIONAL TRIAL ERRORS

Aside from excluding a key witness’s testimony, the trial court made two other significant errors that adversely affected Tim Bills’ defense. First, the trial court remarked about the credibility of Tim Bills’ other eyewitness to the accident. Second, the trial court received irrelevant evidence of equipment violations, thus giving the plaintiff ammunition to assail the

¹ The majority claims that I have “ignored” the “critical fact” that there was no evidence to establish whether Mr. Tyler had actually left Michigan. In my view, this claim is a red herring. The critical analytical inquiry under MRE 804(a)(5) is whether defendants made a reasonable effort to procure Mr. Tyler’s attendance at trial. The record definitively establishes that defendants made diligent efforts—through process and other reasonable means—to procure Mr. Tyler’s attendance at trial.

character of Tim Bills trucking and its driver. In my opinion, the combination of these errors created a perfect storm that denied defendants a fair and impartial trial.

A. EQUIPMENT VIOLATIONS

I concur with the majority opinion that the trial court erred when it determined that evidence of equipment violations was admissible. However, I disagree with the majority that this error was harmless. The equipment violations were not a factor in the accident and should not have been admissible to prove causation. The error in admitting the information into evidence was a substantial injustice to defendants. The error thus requires reversal. See *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003) (“A trial court error in admitting or excluding evidence will not merit reversal unless a substantial right of a party is affected . . . and it affirmatively appears that failure to grant relief is inconsistent with substantial justice.”)

B. JUDICIAL COMMENTARY—WITNESS STEPHENS’ CREDIBILITY

Eric Stephens, a former firefighter, testified at trial. He testified that he had not spoken with a Tim Bills representative the day after the accident. After Mr. Stephens was excused from the courtroom, the trial court stated to the jury:

THE COURT: It’s been brought to my attention that when Mr. Wiseley [plaintiff’s counsel] asked Mr. Stephens had he been contacted by an agent of Tim Bills Trucking the day after the accident, *Mr. Stephens testified no, when in fact, I find out that Mr. Stephens had been contacted by an agent of someone from Mr. Bills trucking company and, in fact, provided a recorded statement.* (Emphasis added).

In essence, the trial court instructed the jury that Mr. Stephens’ testimony was untruthful; that is, Mr. Stephens was lying. A judge pierces the veil of judicial impartiality when his or her conduct or comments unduly influence the jury and deprive a party of a fair and impartial trial. *City of Lansing v Hartsuff*, 213 Mich App 338, 349-350; 539 NW2d 781(1995).

Putting aside whether Mr. Stephens’ testimony was truthful or untruthful, there are many reasons a witness would answer a question in the manner that Mr. Stephens did. First and foremost, the witness may have merely forgotten about the statement. Second, the witness may not have recognized that a statement made to an insurance representative could be deemed a statement to a representative of a party. In my opinion, the trial court unduly influenced the jury by suggesting that Mr. Stephens testified falsely. This error alone is cause to order a new trial.

V. CONCLUSION

I conclude that the cumulative errors at this trial denied defendants the opportunity to present a substantial defense in this matter. See *Stitt v Holland Abundant Life Fellowship (After Remand)*, 243 Mich App 461, 471; 624 NW2d 427 (2000) (cumulative effect of errors may require reversal). The record demonstrates that the significant factual issue at trial was causation. The trial court erred when it excluded the deposition testimony of Mr. Tyler on this issue and compounded this error when it denigrated the testimony of Mr. Stephens. The trial court also erred when it allowed irrelevant equipment violations into evidence, which could easily have mislead the jury on the causation issue.

I would reverse and remand for a new trial. I would also assign this case to a different judge on remand.

/s/ Peter D. O'Connell